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No. 00-1012

In the Supreme Court of the United States

KARUK TRIBE OF CALIFORNIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

In the Hoopa-Yurok Settlement Act, Pub. L. No. 100-580, 102 Stat. 2924 (25 U.S.C. 1300i-1 *et seq.*) (Settlement Act), Congress partitioned the former Hoopa Valley Reservation in northern California, which consisted of a tract principally occupied by Hoopa Indians and a tract principally occupied by Yurok Indians. The Settlement Act placed the first tract in trust for the benefit of the Hoopa Valley Tribe, placed the other tract in trust for the benefit of the Yurok Tribe, and provided compensation and/or the opportunity to enroll in either Tribe for individual Indians who claimed an interest in the former reservation. Petitioners (the Karuk and Yurok Tribes, as well as a number of individual Indians) filed suit against the United States, contending that the Settlement Act deprived them of property and that they were therefore entitled to compensation under the Just Compensation Clause of the Fifth Amendment. The question presented is as follows:

Whether the Settlement Act effected a compensable taking of any property rights of petitioners.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 209 F.3d 1366. The opinion of the Court of Federal Claims (Pet. App. 38a-56a) is reported at 41 Fed. Cl. 468.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 2000. A petition for rehearing was denied on July 24, 2000 (Pet. App. 57a-59a). On October 4, 2000, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including November 21, 2000. On November 14, 2000, the Chief Justice further

extended the time for filing to and including December 21, 2000. The petition for certiorari was filed on December 18, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The former Hoopa Valley Reservation was created by Executive Orders issued pursuant to authority granted by Congress in the Act of April 8, 1864, ch. 48, 13 Stat. 39 (1864 Act). The 1864 Act was enacted "to provide for the better Organization of Indian Affairs in California." 13 Stat. 39. Section 2 provides:

> [t]hat there shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said state, to be retained by the United States for the purposes of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said state, and shall be located as remote from white settlements as may be found practicable, having due regard to their adaptation to the purposes for which they are intended: *Provided*, That at least one of said tracts shall be located in what has heretofore been known as the northern district: *And provided, further*, That if it shall be found impracticable to establish the reservations herein contemplated without embracing improvements made within their limits by white persons lawfully there, the Secretary of the Interior is hereby authorized and empowered to contract for the purchase of such improvements, at a price not exceeding a fair valuation thereof, to be made under his direction. But no such contract shall be valid, nor any money paid thereon, until, upon a report of said contract and of said valuation to

> Congress, the same shall be approved and the money appropriated by law for that purpose: *And provided, further*, That said tracts to be set apart as aforesaid may, or may not, as in the discretion of the President may be deemed for the best interests of the Indians to be provided for, include any of the Indian reservations heretofore set apart in said state, and that in case any such reservation is so included, the same may be enlarged to such an extent as in the opinion of the President may be necessary, in order to its complete adaptation to the purposes for which it is intended.

13 Stat. 40.

On June 23, 1876, President Ulysses S. Grant issued an Executive Order formally establishing the boundaries of the "Hoopa Valley Indian Reservation." Pet. App. 64a. The area described by that Executive Order consisted of slightly less than 90,000 acres and came to be known as "the Square." *Id.* at 3a-4a, 40a, 64a. The Executive Order declared that the reservation was "withdrawn from public sale, and set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in California, by act of Congress approved April 8, 1864." *Id.* at 64a. The Executive Order did not identify any particular Tribe or group of Indians for whose use or benefit the reservation was set aside. See *ibid.*

On October 16, 1891, President Benjamin Harrison issued another Executive Order extending the boundaries of the reservation. Pet. App. 64a-65a. That Executive Order also did not identify any particular Tribe or group of Indians. It directed

> that the limits of the Hoopa Valley Reservation in the state of California, a reservation duly set apart

> for Indian purposes, as one of the Indian reservations authorized to be set apart, in said State, by Act of Congress approved April [8], 1864, (13 Stat. 39), be and the same are hereby extended so as to include a tract of country one mile in width on each side of the [Klamath] River, and extending from the present limits of the said Hoopa Valley reservation to the Pacific Ocean.

Id. at 64a. The territory added to the Hoopa Valley Reservation by the 1891 Executive Order came to be known as "the Addition." *Id.* at 40a. The Addition encompassed lands at the lower reaches of the Klamath River that had been set aside by Executive Order in 1855. See *Mattz* v. *Arnett*, 412 U.S. 481, 485-489, 492-494 (1973).

Historically, most of the Indians of the Square have been Hoopa Indians, while most of the Indians of the Addition have been Yuroks. Pet. App. 40a-41a; see *Mattz*, 412 U.S. at 485-489. Members of the Karuk Tribe were dispersed in both areas but principally occupied aboriginal lands to the east of the reservation. See S. Rep. No. 564, 100th Cong., 2d Sess. 3 (1988) (1988 Senate Report); see also Pet. App. 5a, 41a.

2. During the 1950s, the federal government began to distribute revenues from sales of timber on the Square to the members of the newly organized Hoopa Valley Tribe. *Short* v. *United States*, 486 F.2d 561, 562 (Ct. Cl. 1973), cert. denied, 416 U.S. 961 (1974) (*Short I*). That practice was disputed by individual Indians (principally Yurok Indians) who either resided on or claimed a connection to the Addition part of the extended reservation, and who did not receive distributions because they were not members of the Hoopa Valley Tribe. *Ibid.* They brought suit, asserting a

claim for damages for breach of trust by the United States.

The Court of Claims ruled in the plaintiffs' favor. The court described the broad discretion of the President under the 1864 Act to create, revise, and terminate reservations and to decide which Indians would be settled on them. 486 F.2d at 564-567. Against that backdrop, the court found that

> [w]hen * * * President Harrison by executive order of October 16, 1891 extended the boundaries of the reservation to include the contiguous strip of land along the Klamath River, there were no vested rights to the Square incapable of divestment, or at least dilution, by a Presidential introduction of additional tribes into the reservation. There could be no such rights in view of the President's authority under the act of 1864 and the manner of its exercise to that time.

Id. at 566. The court examined the text of the 1891 Executive Order and concluded that "[n]o reason to the contrary appearing, the order is to be given its natural effect of granting to the Indians of the Addition, as Indians of the enlarged reservation, rights in the reservation equally with the Indians of the Square." *Ibid.*; see *id.* at 567 ("the plain and natural consequence of the [1891] order was the creation of an enlarged, single reservation incorporating without distinction its added and original tracts upon which the Indians populating the newly-added lands should reside on an equal footing with the Indians theretofore resident upon it.").

In a later decision, the Federal Circuit upheld the standards employed by the Court of Claims for identifying the "Indians of the Reservation" who were entitled

to share in the reservation's timber and other income. *Short* v. *United States*, 719 F.2d 1133, 1137-1143 (Fed. Cir. 1983), cert. denied, 467 U.S. 1256 (1984) (*Short III*). The court of appeals in that decision also held that the general statute authorizing sales of timber from unallotted lands, 25 U.S.C. 407, did not restrict distribution of the proceeds to members of recognized or organized Tribes. 719 F.2d at 1136. Rather, the court held, the distribution was to include all individual Indians who were members of Indian groups (including groups that were not recognized or organized Tribes) that were "communally concerned with the proceeds." *Ibid.*

On remand from the Federal Circuit's decision in *Short III*, the Claims Court rejected the *Short* plaintiffs' attempt to recover for distributions made to the Hoopa Valley Tribe as distinguished from distributions made to individual Indians. *Short* v. *United States*, 12 Cl. Ct. 36, 40-42 (1987) (*Short IV*). The court held that "individual Indians do not hold vested severable interests in unallotted tribal lands and monies as tenants in common." *Id.* at 42.[1]

3. On October 31, 1988, Congress enacted the Hoopa-Yurok Settlement Act, Pub. L. No. 100-580, 102 Stat. 2924 (25 U.S.C. 1300i *et seq.*) (Settlement Act). The Senate Report accompanying the Act explained

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[1] In related litigation, five of the *Short* plaintiffs brought suit in the Northern District of California seeking the creation of a reservation-wide tribal government, representative of all the Indians of the Reservation, as a replacement for administration by the Hoopa Valley Tribe. The district court denied the specific relief requested but declared that the Bureau of Indian Affairs had a trust duty to administer the reservation in consultation with all persons who could establish a connection to the reservation. *Puzz* v. *United States*, No. C 80-2908 TEH, 1988 WL 188462 (N.D. Cal. Apr. 8, 1988).

that the *Short* litigation "ha[d] led to a number of companion or collateral cases which have made it impossible for the Hoopa Valley Tribe to perform normal tribal governmental functions, including the management of a significant portion of the reservation property." 1988 Senate Report 1. The Settlement Act partitioned the reservation into two parts, contingent upon the Hoopa Valley Tribe's waiver of claims against the United States and its consent to the statutory apportionment of certain funds. § 2(a), 25 U.S.C. 1300i-1(a). Section 2(b) established and recognized the former Square as the Hoopa Valley Reservation, and placed the unallotted land and assets of the new reservation in trust with the United States for the benefit of the Hoopa Valley Tribe. 25 U.S.C. 1300i-1(b).

Section 2(c) established the Yurok Reservation on the Addition, and provided that the unallotted trust lands and assets of the Yurok Reservation would be held in trust by the United States for the benefit of the Yurok Tribe, which would be organized under Section 9 of the Settlement Act. 25 U.S.C. 1300i-1(c); see 25 U.S.C. 1300i-8. Section 2(c) also provided for the transfer of national forest system lands within the Yurok Reservation to the United States to be held in trust for the benefit of the Yurok Tribe's and for the purchase of additional land for the Yurok Reservation. 25 U.S.C. 1300i-1(c)(2) and (3). Those benefits were conditioned, however, upon the Yurok Tribe's waiving claims against the United States arising out of the Settlement Act. 25 U.S.C. 1300i-1(c)(4).

Section 4(a) of the Settlement Act created the Hoopa-Yurok Settlement Fund from the existing trust accounts maintained by the Interior Department for proceeds from the reservation. 25 U.S.C. 1300i-3(a). Section 5(a) required the Bureau of Indian Affairs to

prepare a Hoopa-Yurok Settlement Roll, consisting principally of persons who were "Indian[s] of the Reservation" as defined by the *Short* criteria. 25 U.S.C. 1300i-4(a); see § 1(b)(5), 25 U.S.C. 1300i(b)(5) (defining "Indian of the Reservation" to mean "any person who meets the criteria to qualify as an Indian of the Reservation as established by the United States Court of Claims in" *Short*). Under Section 6, individuals on the Settlement Roll could elect membership in the Hoopa Valley Tribe, elect membership in the Yurok Tribe, or receive a lump sum payment of $15,000 instead of tribal membership and communal rights in the reservations. 25 U.S.C. 1300i-5. The United States contributed $10,000,000 to the Settlement Fund for use in making lump sum payments to individuals who elected that option. 25 U.S.C. 1300i-3(e).

4. Petitioner Karuk Tribe of California, a federally recognized Indian Tribe claiming an interest in the resources of the reservation, filed suit in the Court of Federal Claims. The Karuk Tribe alleged that the Settlement Act, by excluding the Tribe from the settlement, took property of the Tribe without just compensation, in violation of the Fifth Amendment. Petitioner Yurok Indian Tribe, recognized and organized under the Settlement Act, filed an action claiming that the Settlement Act took its alleged interest in the land and resources of the Square without payment of just compensation. Petitioners Carol McConnell Ammon, et al., individual Indians who were plaintiffs in the *Short* litigation, filed an action claiming that the Settlement Act had taken from them property interests in the reservation without payment of just compensation.[2]

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[2] Section 14(a) of the Settlement Act provides that "[a]ny claim challenging the partition of the joint reservation pursuant to [the

The Court of Federal Claims granted the United States' motion for summary judgment and dismissed the complaints, holding that none of the plaintiffs had a compensable property interest in the land and resources of the former reservation. Pet. App. 38a-56a. The court explained that under Article IV, Section 3 of the United States Constitution, "Congress holds exclusive power to dispose of public lands of the United States," and "[a]ny power of the executive to convey an interest in public lands must be traced to a clear delegation of Congress's Article IV power." Pet. App.

Settlement Act] as having effected a taking under the fifth amendment of the United States Constitution or as otherwise having provided inadequate compensation shall be brought, pursuant to section 1491 or 1505 of title 28, in the United States Court of Federal Claims." 25 U.S.C. 1300i-11(a). The 1988 Senate Report, however, clearly expressed the view that the Act would not effect a compensable taking:

> It is the Committee's conclusion that, as found by the *Short* case, no constitutionally protected rights have vested in any Indian tribe in and to the communal lands and other resources of the Hoopa Valley Reservation. In carrying out the trust responsibility of the United States under Congress' plenary power, the Committee finds that [the Settlement Act] is a reasonable and equitable method of resolving the confusion and uncertainty now existing on the Hoopa Valley Reservation.
>
> While the court in the *Short* case has found that no tribe ha[s] a vested right in the reservation, it was equally clear on the point that none of the plaintiffs nor any other individual has a vested right in the property. * * * [T]he Committee agrees with the court in the Short case that neither the plaintiffs nor any other individuals have a vested right in the Hoopa Valley Reservation as against the right of Congress to make further disposition of that property.

1988 Senate Report 13.

43a (citing *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 104 (1949), and *Sioux Tribe* v. *United States*, 316 U.S. 317, 325-326 (1942)). The court further explained that, "[u]nless recognized as vested by some act of Congress, tribal rights of occupancy and enjoyment, whether established by executive order or statute, may be extinguished, abridged, or curtailed by the United States at any time without payment of just compensation." *Ibid.* (citing *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 278-279 (1955)). The court found no expression in either the 1864 Act, its legislative history, or any subsequent legislative action of a congressional intent to vest petitioners or their ancestors with a compensable property interest in the former reservation. See *id.* at 44a-55a.

5. The court of appeals affirmed. Pet. App. 1a-35a. The court explained that the text of the 1864 Act "provides the President with the discretion to create Indian reservations" and "states expressly that the United States 'retained' the land." *Id.* at 14a. The court found "[n]othing in the language of the 1864 Act" demonstrating a clear congressional intent "to create a vested interest in the Indians who would reside on the reservations created under the Act." *Ibid.* The court also observed that neither the 1876 Executive Order creating the Hoopa Valley Reservation, nor the 1891 Executive Order expanding the reservation's boundaries, contained language "demonstrat[ing] a definite intention by the United States to confer property rights upon the Indians of the Reservation." *Ibid.*

Relying on this Court's decision in *Donnelly* v. *United States*, 228 U.S. 243 (1913), the court also explained that "[t]he conduct of the United States under the 1864 Act further demonstrates that the Act

did not create any compensable property interests for the Indians." Pet. App. 15a. The court observed that

> Presidents Grant, Hayes, Garfield, Arthur, Cleveland, and Harrison, successively, acted with respect to one or more of [the 1864 Act] reservations upon the theory that the act of 1864 conferred a continuing discretion upon the Executive; orders were made for altering and enlarging the bounds of the reservations, restoring portions of their territory to the public domain, and abolishing reservations once made, and establishing others in their stead; and in numerous instances Congress in effect ratified such action.

Ibid. (quoting *Donnelly*, 228 U.S. at 258). The court concluded that "[a]n act that confers such broad discretion—discretion to create and terminate reservations, or parts of reservations, by fiat—does not create compensable rights in such reservations." *Ibid.*

The court of appeals also rejected petitioners' argument that Congress's objective in enacting the 1864 Act —*i.e.*, to establish a "permanent peace" in the conflict between the Indians and the settlers in California—implied an intent to vest the Indians with ownership rights in the reservations. Pet. App. 15a-16a. The court explained that the 1864 Act "implemented its 'peace' purpose, not by giving the Indians vested rights, but by giving the President broad discretion to create reservations." *Id.* at 16a. The court also rejected petitioners' contentions that various congressional actions subsequent to the 1864 Act evidenced an intent to recognize title in the Indians. See *id.* at 16a-22a.

Judge Newman dissented. Pet. App. 25a-35a. Judge Newman concluded that "[t]he Act of 1864 and executive orders of 1876 and 1891 that created the Joint

Reservation, and the plaintiff Indians' possession and occupancy thereof, created property interests of constitutional cognizance." *Id.* at 35a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Nor does the petition raise any question of widespread or recurring significance. Further review is not warranted.

1. Petitioners contend that they each held a property interest in the former Hoopa Valley Reservation that could not be taken by the United States without payment of compensation. As the court of appeals recognized (see Pet. App. 10a-11a), Article IV, Section 3 of the United States Constitution gives Congress the exclusive power to dispose of public lands. In order to prevail in this case, petitioners must therefore demonstrate that either Congress, or the President acting pursuant to statutory authorization, chose to confer upon petitioners (or their ancestors) property rights in the Square. See, *e.g.*, *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 104 (1949); *Sioux Tribe* v. *United States*, 316 U.S. 317, 325-326 (1942). As this Court explained in *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955), "[t]here is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation." *Id.* at 278-279.

The Court has made clear, in particular, that Congress's withdrawal of public land for reservation purposes, or its authorization of similar action by the President, does not in itself confer any property right

upon the Indians who occupy the reservation. In *Hynes*, the Court concluded that statutes authorizing the President and the Secretary of the Interior to withdraw land in Alaska to establish an Indian reservation did not authorize the creation of a reservation that was permanent or nonrevocable. 337 U.S. at 101-104, 106-110. The Court acknowledged that under Article IV, Section 3 of the Constitution, Congress "has the power to dispose of the lands of the United States" and "may convey to or recognize such rights in the Indians, even a title equal to fee simple, as in its judgment is just." *Id.* at 103-104. The Court cautioned, however, that "[w]hen Congress intends to delegate power to turn over lands to the Indians permanently, one would expect to and doubtless would find definite indications of such a purpose." *Id.* at 104.[3]

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[3] Petitioners contend (Pet. 11-12) that "[i]t is settled that the Fifth Amendment protects Indians on reservations fully defined by statute or treaty from the taking of their lands without the payment of just compensation." That statement is overbroad. "When a reservation is established by a treaty ratified by the Senate or a statute, the quality of the rights thereby secured to the occupants of the reservation depends upon the language or purpose of the congressional action." *Hynes*, 337 U.S. at 103. If "Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking." *Tee-Hit-Ton Indians*, 348 U.S. at 277-278. But the existence of an Act of Congress delineating the boundaries of a reservation does not necessarily imply congressional intent to vest title to the land in the Tribe(s) and/or the individual Indians who are the occupants of the reservation. Contrary to petitioners' suggestion (see Pet. 12), neither *Shoshone Tribe* v. *United States*, 299 U.S. 476 (1937), nor *United States* v. *Creek Nation*, 295 U.S. 103 (1935), suggests the existence of a categorical rule that a statute defining the boundaries of a reservation necessarily transfers property rights to the reservation's inhabitants. Those cases simply make clear that where the United States has chosen to vest

2. Petitioners frame the question presented as "whether reservations geographically delimited by executive order pursuant to statutory authority give rise to compensable property rights under the Fifth Amendment." Pet. 11. That question, however, is insusceptible of a categorical answer. Rather, the existence of Indian property rights in a particular Executive Order reservation turns on (a) whether Congress clearly authorized the President to transfer such rights, and (b) if so, whether the President chose to exercise that authority. Cf. note 3, *supra*. The court of appeals did not purport to announce a categorical rule governing all "reservations geographically delimited by executive order pursuant to statutory authority" (Pet. 11), but instead examined the language and early implementation of the 1864 Act. See Pet. App. 13a-16a. The court's decision therefore lacks the broad significance that petitioners attribute to it.

In any event, the court of appeals' decision is correct. Because petitioners have failed to identify any legal text that contains the requisite "definite indications" of an intent to confer property rights in the former Hoopa Valley Reservation, their Fifth Amendment claim fails.

a. As the court of appeals correctly recognized (Pet. App. 13a-16a), the language of the 1864 Act contains no expression of congressional intent to create a compensable interest in any particular Tribe or individual Indian settled on the reservations established pursuant to that Act. Section 2 of the 1864 Act provides that "there shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the

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the Tribe with permanent rights in the land, subsequent interference with those rights may give rise to a compensable taking. See *Shoshone Tribe*, 299 U.S. at 485-488; *Creek Nation*, 295 U.S. at 109.

limits of [California], to be retained by the United States for the purposes of Indian reservations." 13 Stat. 40. Both because the 1864 Act left the number and location of the reservations to the President's "discretion," and because it provided that the relevant land would "be retained by the United States," the Act is not plausibly construed to vest any Tribe or individual Indian with a property right in the tracts ultimately designated by the President.[4]

The breadth and flexibility of the 1864 Act's grant of discretionary authority to the President were confirmed by this Court's decision in *Donnelly* v. *United States*, 228 U.S. 243 (1913), and by the actions of Presidents under the Act. In *Donnelly*, the Court upheld the decision of the President, exercised nearly 30 years after enactment of the 1864 Act, to extend the limits of the former Hoopa Valley Reservation to include the area that subsequently came to be known as the Addition. See *id.* at 256-258. The Court explained:

> Congress could not reasonably have supposed that the President would be able to accomplish the beneficent purposes of the enactment if he were

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[4] Senate Bill 501, 37th Cong., 3d Sess. (1863), a predecessor to the 1864 Act, was introduced in the prior session of Congress and would have established a single reservation expressly for the "perpetual use and occupation" of the Indians in the northern part of the State. Cong. Globe, 37th Cong., 3d Sess. 1302 (1863). The bill that was ultimately enacted in 1864, however, omitted the express grant of a right of "perpetual use and occupation," and instead substituted the scheme of broad and continuing discretion and flexibility in the President. The omission of the quoted language suggests a legislative purpose to avoid constraining the President with an approach that created vested rights in the Indians. Cf. *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 101 (1993).

> obliged to act, once for all, with respect to the establishment of the several new reservations that were provided for, and were left powerless to alter and enlarge the reservations from time to time in the light of experience.

Id. at 256-257. Consistent with that understanding, as the Court explained, successive Presidents thereafter acted with respect to one or more of the reservations set aside by the 1864 Act upon the theory that the Act "conferred a continuing discretion upon the Executive." *Id.* at 258. Under the 1864 Act, the Court observed, "orders were made for altering and enlarging the bounds of the reservations, restoring portions of their territory to the public domain, and abolishing reservations once made and establishing others in their stead." *Ibid.*; accord *Mattz*, 412 U.S. at 493-494 n.15; *Short I*, 486 F.2d at 564-567. That interpretation and implementation of the 1864 Act refute any suggestion that Congress, in enacting the 1864 Act, intended for the boundaries of the authorized reservations, once established by the President, thereafter to remain immutable. As the court of appeals in this case correctly explained, "[a]n act that confers such broad discretion —discretion to create and terminate reservations, or parts of reservations, by fiat—does not create compensable rights in such reservations." Pet. App. 15a.

Petitioners, it should be emphasized, are in no position to question or disparage this Court's holding in *Donnelly*. To the contrary, petitioners' Fifth Amendment claim logically presumes both the propriety of President Benjamin Harrison's 1891 Executive Order and the correctness of the Court of Claims' decision in *Short I*. Petitioners' claim assumes, in other words, both that President Harrison acted lawfully in expand-

ing the Hoopa Valley Reservation to include the Addition, and that the effect of the 1891 Executive Order was to give all Indians having an appropriate connection to the reservation as so expanded an equal claim to all of the expanded reservation's income. If either of those propositions is incorrect, then the partition of the reservation effected by the 1988 Settlement Act could not be thought to deprive petitioners of anything to which they were ever entitled.

Those propositions, however, depend in turn on the assumption that the 1876 Executive Order did *not* confer property rights on the inhabitants of the reservation as then defined (since if such rights were conferred, they would have been taken by the 1891 Executive Order, at least as construed in *Short I*).[5] In order to establish a compensable taking, petitioners must therefore demonstrate that (a) the 1876 Executive Order established a reservation whose boundaries were subject to change and whose original inhabitants were vested with no property rights, while (b) the 1891 Executive Order conferred on the residents of the expanded reservation a property interest in all of the reservation's resources. But nothing in the text of the two Executive Orders suggests that the second Order was intended to have greater permanence than the first. See Pet. App. 64a-65a (reproducing the two Executive Orders).

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[5] The Court of Claims in *Short I* held that "[w]hen * * * President Harrison by executive order of October 16, 1891 extended the boundaries of the reservation * * *, there were no vested rights to the Square incapable of divestment, or at least dilution, by a Presidential introduction of additional tribes into the reservation." 486 F.2d at 566.

b. Petitioners assert (Pet. 18) that "the purpose of the 1864 Act, confirmed by more than a century of history thereafter, was to set aside permanent homes for the Indians of California." It may well be that Congress in passing the 1864 Act anticipated that Indian reservations in California would continue to exist in some form for the foreseeable future. But as this Court recognized in *Donnelly*, Congress did not direct the President to establish "permanent homes for the Indians of California" in the sense of reservations the boundaries of which were required to remain fixed, much less reservations in which the Indians who happen to have been settled on one or another of the reservations at any particular point in time would acquire individual property interests in the reservation that would preclude subsequent revisions in reservation boundaries or settlement. As the court of appeals recognized, Congress in the 1864 Act sought to facilitate peace between the Indians and the white settlers "not by giving the Indians vested rights, but by giving the President broad discretion to create reservations." Pet. App. 16a.[6]

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[6] Moreover, the Settlement Act did not reduce the total acreage set aside for use by "the Indians of California"; it simply reallocated the land among the different Indian Tribes and afforded individual Indians claiming an interest in the former reservation an opportunity to join one of the Tribes. Such a reallocation may effect a taking if Congress has previously guaranteed that a single Tribe will have a permanent right to enjoy the use of a particular tract to the exclusion of others. In *Shoshone Tribe* v. *United States*, 299 U.S. 476, 485-486, 497 (1937), for example, this Court held that a taking occurred when a band of Northern Arapahoes was settled on the Shoshone Tribe's reservation, in derogation of a treaty providing that the land "would be 'set apart for the absolute and undisturbed use and occupation of the Shoshone Indians'" and "that no persons, except a few spe-

c. Petitioners also rely (Pet. 15) on the Act of March 3, 1927, ch. 299, 44 Stat. 1347 (25 U.S.C. 398a *et seq.*) (1927 Act), which authorized oil and gas leasing on unallotted lands within Indian reservations whose boundaries were fixed by Executive Order. Section 4 of that law reserved to Congress the exclusive authority to make changes in the boundaries of Executive Order reservations. 44 Stat. 1347. Petitioners contend (Pet. 15) that the 1927 statute constitutes a recognition of title in Indians occupying such reservations. That claim lacks merit.

The 1927 Act reversed a decision of the Secretary of the Interior to issue permits for oil and gas leasing on Executive Order Indian reservations under the provisions of the generally applicable Mineral Leasing Act, ch. 85, 41 Stat. 437 (30 U.S.C. 181 *et seq.*), under which royalties would be split between the federal government and the State in which the reservation was located. See H.R. Rep. No. 763, 69th Cong., 1st Sess. 2 (1926) (1926 House Report); Mineral Leasing Act § 35, 41 Stat. 450. During congressional debate on the 1927 Act, an issue arose as to whether those persons who had previously filed applications under the Mineral Leasing Act should be allowed to proceed under that law or should be required to file new applications and proceed under the restrictions of the proposed new legislation. See 67 Cong. Rec. 10,913-10,914 (1926). Senator Bratton argued that the applicants should receive the benefit of the Mineral Leasing Act because

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cially enumerated, and governmental agents engaged in the discharge of duties enjoined by law, should 'ever be permitted to pass over, settle upon, or reside' in the territory so reserved.'" But neither the 1864 Act nor the 1891 Executive Order contained a comparable guarantee to petitioners. See 13 Stat. 39; Pet. App. 64a.

in his view the United States retained title to unallotted lands in Executive Order reservations. See *id.* at 10,914; 68 Cong. Rec. 2793 (1927). Senator Bratton and others recognized, however, that the question of title was disputed. See 67 Cong. Rec. at 10,919-10,920; 68 Cong. Rec. at 2793-2794. Senator Jones asserted that "[w]hether it belongs to the United States of America or to the Indians, makes no difference, so far as this bill is concerned," because "Congress has complete control of Indian lands, and regardless of the title * * * Congress has the right to legislate with respect to the development of oil in them and to provide for royalties, and so forth." 67 Cong. Rec. at 10,914; see also 1926 House Report 8 ("Nothing in this bill is intended to in any manner change or alter the ownership or legal and equitable title to the lands described by its terms.").

Thus, although Members of Congress discussed the issue of Indian title in Executive Order reservations in the course of fashioning the 1927 legislation, the matter for decision was the distribution of royalties and the appropriate treatment of prior applicants for mineral leasing permits. No proposal to vest title to such lands was presented for a vote. Contrary to petitioners' suggestion (Pet. 15), the legislative history of the 1927 Act reflects a congressional judgment that the question of title to the lands need not be resolved in order to make an appropriate disposition of the royalties. Petitioners are therefore incorrect in construing the 1927 Act to reflect an affirmative intent by Congress to recognize Indian title in Executive Order reservations. See *Sekaquaptewa* v. *MacDonald*, 448 F. Supp. 1183, 1191-1192 (D. Ariz. 1978) (rejecting the same argument), rev'd in part, 619 F.2d 801 (9th Cir.), cert. denied, 449 U.S. 1010 (1980). The 1927 Act left the title to the lands encompassed in any Indian reservation

established by Executive Order where it was prior to that Act. As we have explained, in the case of the former Hoopa Valley Reservation, title was—and therefore remained—in the United States.

d. Petitioners also revive an argument rejected by the Court of Federal Claims (Pet. App. 51a) but abandoned by petitioners in the court of appeals. They contend (Pet. 15) that the General Allotment Act, 25 U.S.C. 331 *et seq.*, which provided for allotment of any reservation created by Executive Order, constituted a recognition of title in Indians located on such reservations. In *Sioux Tribe*, however, this Court rejected the same argument, explaining that "the inclusion of executive order reservations meant no more than that Congress was willing that the lands within them should be allotted to individual Indians according to the procedure outlined. It did not amount to a recognition of tribal ownership of the lands prior to allotment." 316 U.S. at 330.[7]

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[7] Petitioners seek (Pet. 19) to distinguish *Sioux Tribe* on the ground that the Executive Order reservations created in that case lasted only a few years before being revoked. That factual detail, however, was in no way central to this Court's construction of the General Allotment Act. Petitioners also note (Pet. 11 n.6, 15) that in other litigation now pending in this Court, *United States* v. *Idaho*, 95 F. Supp. 2d 1094 (D. Idaho), aff'd, 210 F.3d 1067 (9th Cir. 2000), cert. granted, No. 00-189 (Dec. 11, 2000), the United States suggested to the district court that the General Allotment Act was a general ratification of Executive Order reservations. The district court concluded in that case, however, that this Court's decision in *Sioux Tribe* precluded reliance on the General Allotment Act, see 95 F. Supp. 2d at 1115 n.24, and the United States did not challenge that holding in the court of appeals, see 210 F.3d at 1073-1081. Instead, the United States' principal argument in that case is that Congress, through its specific actions concerning the reservation established for the Coeur d'Alene Tribe, had expressed the

e. Petitioners also suggest that the duration of their residence on the relevant lands is relevant to their claim of a compensable taking. See, *e.g.*, Pet. 17 (characterizing the court of appeals' decision as holding "that Indians can be the beneficiaries of a hundred years of settled understanding as to their permanent home only to be dispossessed without a cent of compensation"). Nothing in this Court's decisions, however, suggests that Indians can acquire property rights in reservation lands through prolonged occupancy.[8] Rather, the dispositive question is whether there is a "definite intention by congressional action or authority to accord legal rights, not merely permissive occupation." *Tee-Hit-Ton Indians*, 348 U.S. at 279. As the court of appeals correctly held, neither the 1864 Act nor the 1891 Executive Order reflects any such "definite intention." Con-

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clear intent that the Tribe retain the beneficial ownership of the reservation, including submerged lands, after the admission of Idaho as a State. The district court and the court of appeals agreed. See 95 F. Supp. 2d at 1110-1117; 210 F.3d at 1073-1079.

[8] Petitioners' reference (Pet. 17) to "a hundred years of settled understanding as to their permanent home" is in any event considerably overstated. The Hoopa Valley Reservation did not include the Addition until 1891. Even after that time, there was no "settled understanding" as to the character of the expanded reservation. In *Short I*, the government "contend[ed] that the purpose of the [1891] executive order was to join the parts of the enlarged reservation only technically, for administrative purposes only, the Indians of each tract to retain their rights in their respective tracts." 486 F.2d at 567. Although the Court of Claims in *Short I* rejected that construction of the 1891 Executive Order (see pp. 4-5, *supra*), the very existence of the controversy belies the existence of any prior "settled understanding." See also 1988 Senate Report 13 ("the Committee finds that [the Settlement Act] is a reasonable and equitable method of resolving the confusion and uncertainty now existing on the Hoopa Valley Reservation").

gress was therefore free, in exercising its role as guardian of the interests of all the Indians involved, to adjust the boundaries and beneficiaries of the reservation without paying compensation to those adversely affected.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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